UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

FIRST TRANSIT, INC.

Employer

and Case 5-RC-15797

UNITED FOOD & COMMERCIAL WORKERS, MUNICIPAL & COUNTY GOVERNMENT EMPLOYEES ORGANIZATION, LOCAL 1994, AFL-CIO/CLC

Petitioner

and

AMALGAMATED TRANSIT UNION[1]

Intervenor

DECISION AND DIRECTION OF ELECTION

The issues in this proceeding are: (1) whether the petition filed by United Food and Commercial Workers, Municipal & County Government Employees Organization, Local 1994, AFL-CIO/CLC to become the exclusive bargaining representative of employees at the Employer's Kensington, Maryland facility should be dismissed because of the Employer's imminent consolidation of its operations; and (2) whether the petitioned-for single facility unit at the Employer's Kensington, Maryland location is an appropriate unit for bargaining. There is no relevant history of collective bargaining at this location; however, the Employer has another facility in Beltsville, Maryland which performs work identical to that performed at its Kensington location. The bus operators at the Employer's Beltsville location are currently represented by the Intervenor and have been so represented for the past 10 years. Their current collective-bargaining agreement expires April 30, 2005.[2]

[1] The formal papers in this proceeding identify the Intervenor as Amalgamated Transit Union. At hearing, Intervenor identified itself as Amalgamated Transit Union, Local 1493, but in a subsequent letter to the Region dated March 14, 2005, it asked to be identified as Amalgamated Transit Union.

[2] The Intervenor represents the bus operators only, not the bus cleaners, mechanics, or maintenance foremen, at the Beltsville facility. The employees employed at the Beltsville

The Petitioner ("UFCW") seeks to represent all bus operators, mechanics, bus cleaners and maintenance foremen employed by the Employer at its Kensington, Maryland location, excluding all other employees, guards, and supervisors as defined by the Act.[3] The Intervenor ("ATU") also seeks to represent these employees, in a separate unit from the unit it currently represents at the Employer's Beltsville location. Petitioner and Intervenor contend that the Kensington employees are an appropriate unit for bargaining as a single-location unit. They assert that the Employer's plans to merge the two locations into one consolidated facility in Kensington should not impact the analysis because the merger is not sufficiently imminent and certain that it should affect processing of the petition under Board law.[4]

The Petitioner and Intervenor stated at hearing that they are prepared to proceed to an election in any unit found appropriate by the Regional Director.

In its brief, the Employer ("FTI") maintains that the petition should be dismissed because the merger is imminent and certain. Thus, the Employer asks that the petition be dismissed without prejudice and re-filed – to include all employees from Beltsville and Kensington – once the merger is complete. FTI's position in its post-hearing brief differs somewhat from its position at hearing. At hearing, the Employer did not ask that the petition be dismissed. Rather, on the record, the Employer's position was that the only appropriate unit was a multi-location unit encompassing employees in Beltsville and Kensington.

I have carefully considered the evidence and arguments presented by the parties on these issues. As discussed below, I conclude that the merger is neither imminent nor certain, and is too speculative and theoretical to warrant dismissal of the petition. I further conclude that the Employer has not rebutted the presumption that the petitioned-for single-facility unit is an appropriate unit

The Employer presented testimony from Tom Cain, General Manager, and Scottie Borders, Assistant General Manager of the Beltsville and Kensington facilities. No other witnesses testified at hearing.

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facility include 62 bus operators, five mechanics, two bus cleaners, and one maintenance foreman.

[3] The petitioned-for unit originally included field supervisors and dispatchers and did not include maintenance foremen. At Hearing, the Petitioner amended the unit to include maintenance foremen and exclude field supervisors and dispatchers. The petitioned-for unit consists of approximately 85 bus operators, two bus cleaners, five mechanics, and two maintenance foremen.

[4] Petitioner and Intervenor also urge me to find that the petitioned-for unit would be appropriate regardless of the status of the merger. They argue that even if the merger occurred, the two units still would not be "functionally integrated" to the point where separate units would be inappropriate. I find it both unnecessary and impossible to reach this issue in the instant case, where, as discussed below, the very fact of the merger is speculative, let alone any details of how the operations would be combined if in fact the merger occurs.

FACTUAL SETTING

A. The Beltsville and Kensington Operations

FTI provides public transit bus service for Montgomery County, Maryland ("the County"). The Employer has a single contract with the County but performs the work out of two separate facilities: one in Kensington, which is located in the County, and one in Beltsville, which is located in neighboring Prince George's County. FTI has had successive contracts with the County to perform this work for the last 17 years. Throughout that time, FTI has performed the work at these two locations.

Both the Beltsville and Kensington locations have bus operators, bus cleaners and mechanics, and maintenance foremen. These employees are hired to work at one facility or the other, but not both. Bus operators at both locations are responsible for driving buses either along fixed routes established by the County or 'paratransit' routes, which are need-based trips for riders with disabilities. Bus cleaners at both locations clean the buses, and mechanics at both locations perform mechanical and maintenance work at on-site maintenance bays located at each facility. Maintenance foremen perform cleaning and mechanical work as well as filling out administrative reports and ordering parts.

Tom Cain is the General Manager for the Beltsville and Kensington locations. The rest of the management staff consists of Scottie Borders, Assistant General Manager, Christopher Williams, Operations Manager, and Troy Scarboro, Maintenance Manager. All of the management staff is primarily based in Kensington, but goes back and forth regularly (in Borders' case, daily) between the sites.[5]

Each facility has employees who work as "dispatchers/road supervisors". The parties have stipulated that the dispatchers/road supervisors are supervisors as defined in Section 2(11) of the Act based on their authority to responsibly direct work and effectively recommend discipline. Eight dispatchers/road supervisors work at the Kensington location; six work at Beltsville. The dispatchers/road supervisors do not move between locations. Individuals in these classifications work in pairs; one dispatcher/road supervisor works at a desk as a dispatcher while the other takes a company car and goes out on the road to perform "street supervision", checking on buses and responding to complaints and accident scenes. Dispatchers only interact with bus operators who work out of their particular facility. When a bus operator arrives at work, he/she goes directly to the dispatcher to pick up his/her manifest with route information for the day. From there the bus operator goes to the parking area where the buses are located and begins work. Throughout the day, bus operators communicate with the dispatcher by radio. Beltsville bus operators communicate with the Beltsville dispatcher while the Kensington bus operators communicate with the Kensington dispatcher. In some circumstances, however, road supervisors may interact with bus operators from either facility. If there were an accident

[5] FTI is a national company, with locations throughout the country. However, the record contains no meaningful evidence regarding the Employer's central management and how, if at all, it impacts or controls the operations at Kensington or Beltsville.

involving a Beltsville bus operator, for example, the road supervisor who was closest to the accident would report to the scene, regardless from which facility the supervisor worked.

Approximately 90 bus routes run out of Kensington each day; about 63 routes run out of Beltsville. These routes do not overlap; in other words, no two routes make any of the same stops. There are about 64 buses that run out of Kensington and about 43 that run out of Beltsville; the buses start and end each day at the same facility. Work bids occur quarterly at each facility. The County determines which routes will be run out of the Beltsville location and which will be run out of the Kensington facility, and then the County presents the routes to each facility. Bus operators bid on the routes they would like – Kensington bus operators bid only on Kensington routes and Beltsville bus operators bid only on Beltsville routes. Bids are awarded based on seniority. Beltsville and Kensington have separate seniority lists.

There are significant differences between the terms and conditions of employment of the bus operators at Kensington and Beltsville.[6] They have different wage scales: at Kensington the wage range for bus operators is $12.26 – $19.18/hour, while at Beltsville the range is $12.46 - $14.73/hour. Kensington bus operators have an incentive-based pay system while Beltsville bus operators do not. The bus operators at the two facilities have different health insurance plans and carriers as well as different vacation and leave policies. The Beltsville bus operators, whose terms and conditions of employment are largely governed by their collective-bargaining agreement, have a grievance procedure while the Kensington bus operators do not.

In the last nine months, there have been six permanent transfers among the 147 bus operators: all from Kensington to Beltsville. Borders testified that all six transfers were initiated by the bus operators for a variety of personal reasons, generally because the bus operators live closer to the Beltsville location. Bus operators fill in for each other on an inter-location basis when there is a staffing shortage. According to Borders, this occurs "a couple of hours a day…just about every day or every couple of days." The record does not reflect further detail on this issue, including how many Beltsville bus operators may fill in at Kensington, or vice versa, during any given time frame.

There were no permanent transfers among the bus cleaners, mechanics or maintenance foremen during the last nine months, and no evidence was adduced regarding any permanent transfers prior to that. The three maintenance foremen – two at Kensington, one at Beltsville – fill in for each other in cases of absenteeism, but the record does not reflect how often this occurs. The record is devoid of evidence regarding temporary interchange among cleaners and mechanics.

B. The Proposed Merger/Consolidation of Beltsville and Kensington

In February 2004, the County issued a Request for Proposals ("RFP") to bid on the transit contract which was at that time being operated by FTI. The RFP contains a provision stating as follows: "Contractor must provide an operations and maintenance center within Montgomery

[6] Almost no evidence was adduced at hearing about the terms and conditions of employees other than the bus operators.

County from which the contractor-operated small bus service will be located and where the 100+ fleet of small buses are to be garaged and maintained." FTI submitted a proposal at the end of March, 2004. Included in FTI's proposal is a plan to consolidate the two locations at the existing Kensington facility. FTI was not officially selected to receive the new contract with the County, until February 2005, but the Employer was unofficially notified that it would be the successful bidder in late summer 2004. The contract between FTI and the County, signed in February 2005, does not address the issue of facility location.

In its Spring 2004 proposal, FTI outlined several steps it would take to effect the consolidation of operations at Kensington, including: (1) paving the facility; (2) constructing two additional maintenance bays; (3) installing an above-ground fuel tank; (4) repair perimeter fencing; (5) renovate and build out office space; (6) renovate and install restrooms; and (7) install perimeter fencing. I will address the status of each of these projects in turn.

FTI completed paving at the Kensington facility before November 2004. The evidence does not reflect when this was accomplished or exactly what portion of the facility was paved. FTI has not taken any steps to construct more maintenance bays. According to General Manager Tom Cain, this is no longer part of the Employer's plans for the site; instead, FTI is planning to take over office and warehouse space adjacent to its current Kensington facility, where additional maintenance bays are already located. This adjacent space is currently occupied by another tenant who has a lease through September 2005. Cain testified that FTI has a verbal agreement with the landlord to take over the facility when the tenant vacates. The Employer presented no documents, signed or unsigned, to this effect. Cain also testified that "there's also talks going on with [the current tenant]," about the tenant vacating the space before its lease expires. Nothing has been resolved in this regard; however, as of March 1, 2005 the Employer began leasing additional outdoor parking space at the Kensington facility. No lease has been signed regarding this outdoor space, and it is being used for vehicles/ equipment from FTI's Kensington facility. No Beltsville vehicles, equipment, or personnel have moved to Kensington.

Tom Cain testified that FTI plans to lease or purchase a fuel tanker that will be stationary on the property. This is a change from past practice, where the bus operators purchased fuel at commercial gas stations. The County is now beginning to buy its fuel in bulk in order to save money; thus, the Employer needs a tanker to store the fuel the County is purchasing for the contract. Cain testified that he has made a phone call to a fueling contractor regarding leasing or purchasing a storage tank. The Employer has not taken any further action on this issue. FTI has not made a decision about whether to lease or purchase. Cain was unaware of the cost of leasing and/or buying a tank.

FTI has not and does not plan to perform items (4) and (7), regarding perimeter fencing. According to Cain, these items are no longer necessary if FTI takes over the space adjacent to its current Kensington facility.

Item (5), renovating and building out office space, has also changed since it was conceptualized in FTI's proposal to Montgomery County. According to Cain, if FTI can get the additional space adjacent to the Kensington facility, it will not need to "build out" office space. Interior renovations will still be necessary, but they will be less extensive than originally

anticipated. Cain testified that FTI will be working with Donohoe Construction to design and complete the renovations. At hearing, the Employer introduced two contract proposals (a proposal from Donohoe dated December 2004 and a counterproposal from FTI dated January 2005) regarding the initial design/drawing portion of the project. Neither of these proposals has been signed by both parties; according to Cain, there is a verbal understanding regarding the work but no signed contract. According to Cain, FTI has not received any drawings or designs from Donohoe, and FTI has not paid Donohoe any money for its services. Cain testified that the renovation would cost around $500,000; Donohoe's proposal covers work costing approximately $26,000. The timeline for completing the renovations is unknown.

No evidence was adduced regarding item (6).

In addition to the items outlined above, the Employer provided testimony on other issues under consideration which relate to a merger. Cain testified that FTI has not determined how it would resolve the differences in wages, benefits, seniority and other terms and conditions of employment between employees at the two facilities if the facilities merged; according to Borders, the managers at Kensington/Beltsville have not yet discussed these issues with FTI's corporate headquarters. FTI has raised these issues with ATU, but no negotiations or proposals have been presented. Cain further testified that no employees (other than managers) have been notified of an impending merger. Additionally, FTI has a lease for the Beltsville facility through July 2006. Cain testified that he called the Employer's real estate department and spoke with someone there named Brian Hamilton about subleasing the Beltsville facility. No further evidence was adduced on this issue.

Cain testified that the Employer plans to move all operations from Beltsville to Kensington within the next 30 – 60 days. According to Cain, the Employer will lease a trailer to accommodate the additional employees at Kensington until such time as permanent space is ready. Borders testified that FTI has not determined which personnel will be housed in the trailer. According to Cain, the Employer is "exploring prices" on leasing a trailer; at present there are no cost estimates for this expenditure. The record contains no further documentary or testimonial evidence regarding the plan to move within 30 – 60 days.

ANALYSIS

This proceeding presents two issues: (1) whether the petition should be dismissed because of the imminent consolidation of the Employer's operations, and (2) whether the petitioned-for unit is an appropriate unit for bargaining. The first issue is the threshold one: if the petition should be dismissed due to a change in the Employer's operations, then the second issue becomes moot.

I. Analysis: Consolidation/Merger Issue

The Board's longstanding policy is that it will not conduct an election where permanent changes to the scope and composition of an otherwise appropriate unit are imminent and certain. *See, e.g., Larson Plywood Company*, 223 NLRB 1161 (1976)(permanent layoff); *Hughes Aircraft Co.*, 308 NLRB 82 (1992)(same); *Massachusetts Electric Company*, 248 NLRB 155,

157 (1980)(merger/consolidation of facilities); *Witteman Steel Mills, Inc.*, 253 NLRB 320 (expansion). Although there is no bright-line test in making that determination, the Board looks to the totality of circumstances and requires that an employer's stated intention to expand, contract or cease operations is based on evidence that is more than speculative. *See, e.g., Canterbury of Puerto Rico, Inc*. 225 NLRB 309 (1976).

I find that the record evidence is insufficient to establish that the Employer's consolidation of its operations is imminent and certain. As discussed above, FTI failed to produce any documentary evidence showing that consolidation of facilities is imminent or certain. The additional office space needed at the Kensington facility is not available until October 2005, unless the current tenant leaves early. FTI does not have a signed lease for the necessary additional space at any point in time, either before or after October 2005. No plans have been finalized, or indeed even drafted, for renovation of the necessary additional space. A fuel tank has not been procured for on-site fueling, either on a temporary or permanent basis. The Employer asserts that the facilities will be consolidated in the next 30 to 60 days, but employees have not been notified of a potential merger, no arrangements have been made to accommodate the additional employees, and the Beltsville facility has been leased by the Employer until July 2006.

While the Employer's witnesses testified that the merger would occur, and quickly, the facts are that the Employer has committed no funds, signed no documents, established no firm timeline, and made scant other arrangements for permanent consolidation. Additionally, the evidence reveals no external pressure on the Employer to merge the Beltsville facility to Kensington. The contract between FTI and the County contains no language requiring the Employer to consolidate its facilities. The language of the County's original Request for Proposals is ambiguous; it states that the contractor must have "an operations and maintenance center within Montgomery County…" which FTI already has. Indeed, the term of the new contract has already begun and there is no evidence, documentary or otherwise, that Montgomery County has or will require FTI to consolidate its facilities.

Under these circumstances, I find that the proposed merger/consolidation is neither imminent nor certain enough to warrant dismissal of the petition. The Employer cites *Some Industries, Inc.*, 204 NLRB 1142 (1973) in support of its contention that the petition should be dismissed. Unlike the instant case, the Employer in *Some Industries* had taken many concrete steps toward expansion as of the date the petition was filed, including the purchase and installation of new equipment and the hiring of additional employees, which warranted the conclusion that expansion was imminent and certain.[7] For the foregoing reasons, I deny the Employer's request to dismiss the petition.

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[7] In its Brief, FTI also expresses concern that the Beltsville operators will not be able to choose a bargaining representative if the facilities are consolidated in the future. This concern is misplaced. If the consolidation does occur, the employees would have access to a range of Board processes, depending on the functional integration of the operations as well as the nature and extent of union representation among employees. *See, e.g., Martin Marietta Chemicals*, 270 NLRB 821 (1984); *Boston Gas*, 235 NLRB 1354 (1978); *Massachusetts Electric Company*, 248 NLRB 155 (1980); *Renaissance Center Partnership*, 239 NLRB 1247 (1979).

II. Analysis: Single versus Multi-Location Issue

Section 9(b) of the Act states the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof…." The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be "appropriate." *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Parsons Investment Co.*, 152 NLRB 192, fn. 1; *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enf'd. 190 F.2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc.*, 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4th Cir. 1962), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F. 2d 478, 480 (10th Cir. 1962).

It is incontrovertible that a single-facility unit is presumptively appropriate for collective bargaining, unless it has been so effectively merged into a more comprehensive unit, or so functionally integrated, that it has lost its separate identity. *Dattco, Inc.*, 338 NLRN 49 (2002); *New Britain Transportation Co.*, 330 NLRB 397 (1999). To determine where the presumption has been rebutted, the Board considers such factors as central control over daily operations and labor relations, including the extent of local autonomy; the extent of functional integration of operations; degree of employee interchange and work contacts among employees; similarity of skills, functions and working conditions; past bargaining history; physical or geographic separation of locations; and the scope of the unit sought by any labor organization. *See, e.g., J & L Plate, Inc.*, 310 NLRB 429 (1993); *Welsh Co.*, 146 NLRB 713 (1964). "The party opposing the single-facility unit has the heavy burden of rebutting its presumptive appropriateness." *Trane, Inc.*, 339 NLRB 866 (2003).

I find the Employer has not met its burden of establishing that the petitioned-for, single facility unit is inappropriate. As discussed *supra*, the alleged merger of operations between Beltsville and Kensington is uncertain and wholly prospective; thus it is inappropriate to evaluate whether, if a merger were to occur, the identities of the Beltsville and Kensington employees would be separate or integrated. At this time, when the merger has not occurred and is neither imminent nor certain, I find that a single-facility unit is *an* appropriate unit. While management is centralized – the same staff of managers oversees both facilities – the facilities operate as separate entities on a day-to-day basis. Dispatchers, who are first line supervisors, work out of one facility only; Kensington dispatchers assign and direct the work of Kensington bus operators only, while Beltsville dispatchers only supervise Beltsville bus operators. Each facility has its own buses and is responsible for running entirely separate bus routes; there is no overlap between routes. Each location has its own area for parking, cleaning and maintaining the buses, and each location has a separate staff of bus cleaners and mechanics who service only the buses which operate out of that location. The Employer does not determine which routes run out of its facilities; the County makes this decision and presents separate lists of routes to the two

locations. Bus operators are hired to work out of one location, not both, and are only eligible to bid on routes at the location for which they have been hired.

Additionally, the evidence does not reveal significant interchange between the two facilities. The Employer described instances of temporary employee interchange in the following exchange with the Hearing Officer:

Mr. Borders:	There are times when we use the operators when there's a shortage at both locations to do assignments, and that can be, you know, a couple of hours a day.
Hearing Officer:	Okay. Approximately how often has that occurred?
Mr. Borders:	Just about every day or every couple of days.

This is virtually the only evidence presented by the Employer to support its claim that there has been significant temporary employee interchange. The evidence is of little evidentiary value because the Employer did not present evidence on the percentage of the total number of routes and paratransit trips involving temporary interchange or the percentage of the total employees involved in temporary interchange. As the Board noted in *New Britain Transportation*, "the presumption has not been rebutted where an employer's interchange data is represented in aggregate form rather than as a percentage of total employees… [E]mployee contact of the kind described here may be considered 'interchange' where there is evidence that a significant portion of the work force is involved." 330 NLRB at 398 (internal citations omitted). FTI provided no such evidence in the instant case.

The record also revealed scant evidence of permanent interchange. No permanent transfers between maintenance foremen, bus cleaners or mechanics have occurred within the last nine months, and the Employer provided no evidence that any such transfers occurred prior to that time. There have been six transfers – all from Kensington to Beltsville – among the 147 bus operators within the last nine months: in other words, four percent of the bus operators have been involved in permanent interchange. As discussed earlier, all six of these transfers were initiated by the employee – they were completely voluntary. Voluntary interchange is given less weight in determining if employees from different locations share a common identity. *D&L Transportation,* 324 NLRB 160 at n. 7 (1997).

The next factor in the analysis, similarity of skills, functions and working conditions, also does not militate against a single-location unit. While the employees at Kensington and Beltsville have the same skills and functions, their terms and conditions of employment are substantially different. As discussed in more detail above, bus operators at Beltsville are subject to a different wage scale, health insurance plan and provider, vacation policy, leave policy and grievance procedure than employees at Kensington. Additionally, they have separate seniority systems. The reason for these differences is that the Beltsville bus operators have a collective-bargaining history as a separate appropriate unit, yet another significant factor which cuts in favor of the single-facility presumption. *Children's Hospital of San Francisco*, 312 NLRB 920 (1993)('compelling circumstances' necessary to overcome significance of bargaining history as a single facility location); *see also Esco Corporation,* 298 NLRB 837, 839 (1990).

With respect to the final two factors in the single-facility test, geographic separation between locations and the scope of the unit sought by involved labor organizations, the instant case is factually indistinguishable from *New Britain Transportation Co.* In that case, the Board analyzed the factors as follows:

> The facilities are located 6 to 12 miles apart. This geographic separation, while not determinative, gains significance where, as here, there are other persuasive factors supporting the single-facility unit. We note in this regard the Employer's [...] testimony that the Employer does not permanently transfer individuals to other facilities against their wishes because the employees prefer to work near their homes. Finally, that [...]no other labor organization seeks to represent the employees on a broader basis, are factors that also support the Petitioner's requested single-facility unit.

330 NLRB at 398 (internal citations omitted). *See also Courier Dispatch Group, Inc.,* 311 NLRB 728, 731 (1993)(relying on fact that no labor organization sought to represent larger unit in finding single-facility unit appropriate); *Bowie Hall Trucking,* 290 NLRB 41 (1988) (same).

Recent cases where the Board has found multi-facility units in the bus/trucking industry are easily distinguishable from the facts in this case. *Compare, e.g., Dattco, Inc.,* (employees at several bus terminals placed in a multi-location unit where all employees had identical wages and benefits determined corporate-wide, all body work on buses was performed at a single terminal, route assignments out of all terminals were formulated by headquarters and no collective bargaining history existed); *R&D Trucking*, (employees at two loading/docking facilities placed in same unit where, *inter alia,* they shared equipment, had identical benefits and supervision and regular and substantial interchange). Weighing all of the factors in the instant case, and noting particularly the long and successful bargaining history of the separate unit of Beltsville bus operators, I find that the single-unit presumption has not been rebutted. Accordingly, I find the petitioned-for Kensington unit is an appropriate unit.[8]

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. Petitioner, United Food and Commercial Workers, Municipal & County Government Employees Organization, Local 1994, AFL-CIO/CLC, a labor organization as defined in Section 2(5) of the Act, claims to represent certain employees of the Employer.

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[8] While unnecessary to decide in view of my finding that the petitioned-for, single facility unit is an appropriate unit for bargaining, I note that even were I to find the single-facility presumption rebutted, dismissal of the petition would not be warranted. Rather, the petitioned-for Kensington employees (perhaps with the addition of the unrepresented Beltsville bus cleaners, mechanics, and maintenance foreman) would constitute a proper residual unit of all unrepresented employees. See, generally, *Carl Buddig & Co.*, 328 NLRB 929 (1999); *Fleming Foods*, 313 NLRB 948 (1994); *Cities Service Oil Co.*, 200 NLRB 470 (1972). In this regard, it is undisputed that the Beltsville bus operators are, and have been for many years, represented by Intervenor. It is further undisputed that no question concerning representation has been raised with regard to those Beltsville employees. Hence, even if the petitioned-for unit is not found to be separately appropriate, the petitioned-for employees (with the possible addition of the relatively few unrepresented Beltsville employees) would constitute a residual unit of all unrepresented employees of the Employer, and, hence, an appropriate voting group.

4. Intervenor, Amalgamated Transit Union, a labor organization as defined in Section 2(5) of the Act, claims to represent certain employees of the Employer

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The parties stipulated that First Transit, Inc., a Florida corporation, is engaged in the operation of a public transit operation at its Kensington, Maryland facility. During the past 12 months, a representative period, the Employer derived gross revenues from this operation in excess of $250,000, and purchased and received products, goods and materials valued in excess of $5,000 directly from points located outside the State of Maryland.

7. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time bus operators, bus cleaners, mechanics, and maintenance foremen employed by the Employer at its Kensington, Maryland facility excluding all other employees, dispatchers/road supervisors, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the **UNITED FOOD AND COMMERCIAL WORKERS, MUNICIPAL & COUNTY GOVERNMENT EMPLOYEES ORGANIZATION, LOCAL 1994, AFL-CIO/CLC** or by the **AMALGAMTED TRANSIT UNION**, or by **NEITHER**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3)

employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, 103 South Gay Street, Baltimore, MD 21202, on or before **MARCH 31, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request

must be received by the Board in Washington by 5 p.m., EDT on **April 7, 2005**. The request may not be filed by facsimile.

(SEAL) WAYNE R. GOLD

Dated: MARCH 24, 2005

Wayne R. Gold, Regional Director
National Labor Relations Board
Region 5